TABLE OF CASES

	PAGE
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244	3, 4, 5, 6
Chicago, B. & Q. R. Co., Operation, 282 I.C.C. 249 (Div. 4, 1951)	3
Chicago, M. St. P. & P. R.R. Abandonment, 254 I.C.C. 821 (Div. 4, 1943)	3
Great Southwest R. Co.—Construction, 295 I.C.C. 829 (1958)	3
Illinois Term. R. Co., Construction, 290 I.C.C. 342 (Div. 4, 1954)	3
I.C.C. v. *Oregon-Washington R. Co.*, 288 U.S. 14	4
Long Island R.R. v. *New York Central R. Co.*, 281 F.2d 379 (1960)	6
Maintenance of Way Employees v. *United States*, 366 U.S. 169	4
Piedmont & N. Ry. Co. v. *I.C.C.*, 286 U.S. 299	5
Powell v. *United States*, 300 U.S. 276	6
State of Georgia v. *United States*, 156 F. Supp. 711 (N.D.Ga. 1957), aff'd. 356 U.S. 273	7
State of Illinois v. *United States*, 213 F. Supp. 83 (N.D.Ill. 1962) aff'd 373 U.S. 378	7
Texas & Pacific Ry. v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266	4, 6
Toledo, P. & W. R.R.—Trackage Rights, 307 I.C.C. 801 (1958)	2, 6
United States v. *Drum*, 368 U.S. 370	7
United States v. *Idaho*, 298 U.S. 105	6
Yonkers v. *United States*, 320 U.S. 685	6

No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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1. A material inaccuracy in appellees' answering brief compels this reply. At page 16, referring to the "seven" Commission decisions cited by North Western which establish I.C.C.'s jurisdiction over new interchanges appellees assert that "[n]one of these decisions support appellant's construction because in none was the question of the Commission's jurisdiction raised by counsel or adjudicated by the Commission."

In fact, North Western's basic brief cited *ten*, not seven, such decisions, each supporting this proposition. While not all ten recite denial of jurisdictional motions, they evidence clearly the widespread industry practice of seeking I.C.C. authority for new interchanges, a practice extending over many years. Appellees have simply ignored three of them in asserting that none actually adjudicate the issue of I.C.C. jurisdiction. Appended to this reply are copies of two of the decisions avoided by appellees: *Toledo, P. & W. R.R.—Trackage Rights,* 307 I.C.C. 801 (not printed in full in the official reports, 1958) (Appendix 14 to 38) and *Great Southwest R. Co.—Construction,* 295 I.C.C. 829 (not printed in full in the official reports, 1958) (Appendix 1 to 13). At the request of North Western,[1] the Commission's Secretary certified to the Clerk of this Court[2] copies of these decisions, which are reprinted in the appendix to this reply.

As stated in North Western's opening brief,[3] the Commission in *Toledo*[4] denied a requested finding that it lacked jurisdiction[5] of an application for North Western and Toledo to operate over 519.8 feet of connecting track costing a total of $25,468.00.[6] Weighing the limited capital outlay required to establish this simple facility against its

1. Letter of September 29, 1964 from John C. Danielson to Harold D. McCoy, Secretary of the Interstate Commerce Commission, a carbon of which was lodged with the Clerk of this Court.

2. Letter of September ..; 1964 from Harold D. McCoy, Secretary, to John F. Davis, Clerk of this Court.

3. Brief of Appellant North Western at page 11, footnote 10.

4. *Toledo, P. & W. R.R. Trackage Rights* set out in full at Appendix 14 to 38.

5. Appendix 14 at page 15.

6. Some $3,222.00 less than appellees expended here at Republic Junction.

commercial and competitive significance,[7] the Commission held:[8]

> Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

Similarly, in *Great Southwest R. Co.—Construction*, 295 I.C.C. 829 (1958)[9] the Commission granted Rock Island a certificate to operate a new interchange over an existing track 1.79 miles long and granted Texas & Pacific authority to build ½ mile of track and to operate a new interchange over it. Over a motion to dismiss,[10] based on Section 1 (22), the Commission held (at page 3 of the Appendix) that:

> the proposed line of the Texas and Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the construction and operation contemplated by Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

It may also be noted that in abandoning interchange connecting tracks like these at Republic Junction appellee Milwaukee has requested and received §1 (18) authorization from the Commission. *Chicago, M.St.P. & P. R.R. Abandonment*, 254 I.C.C. 821 (Div. 4 1943).

Thus I.C.C.'s long-standing interpretation has received even appellees' acquiescence for over 20 years, and, since

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7. Appendix 14 at pages 24-27, 30-37.

8. *Id.* at 18.

9. Appendix 1-13. Note carefully that Rock Island there requested and received authority to operate a new interchange over *existing* track (Appendix 1 at 3 and 12). See also *Chicago, B. & Q. R. Co., Operation*, 282 I.C.C. 249 at 252-253 (Div. 4 1951) and *Illinois Term. R. Co., Construction*, 290 I.C.C. 342, 343 (Div. 4, 1954).

10. *Id.* at 3.

all signposts of congressional intent and the prior decisions of this Court support its decision here, the Commission decision should be affirmed. See *Maintenance of Way Employees* v. *United States*, 366 U.S. 169 at 179.

2. Appellees appear to persist in the position that reviewing courts must independently redetermine the scope of I.C.C.'s jurisdiction.[11]

The district court here, unhampered by the Commission's findings on the substantive economic issues, chose to determine for itself (R. 388) whether the new operation constituted "an extension" of operations. Relying entirely upon the "invasion" theory of *Texas & Pacific* (R. 388-389) the court squarely held (R. 390) that "[t]he fact that a new 'through route' is opened does not make the track an extension of [appellees'] lines." Equating "extensions" of operations under the statute with "invasion of territory," since no physical invasion had occurred, said the court (R. 390-391), the Commission should have had no concern with the new operation.

We submit that the statute admits of no such simple interpretation for as this Court recognized as early as 1933[12] "an extension . . . need not . . . be a building into a new and previously unserved locality." Instead,

11. Appellees' brief at 45-60 argues that this type of redecision on review does not amount to *de novo* determination. Our point is simply this—the independent redecision of this point by the lower court, although no new evidence was taken, amounted to a *de novo* determination. The restricted use of this term is of course readily apparent.

12. *I.C.C.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 at 39. Note that this decision (*id.* at 38-39) itself relies upon *Alabama & Vicksburg*.

whether a physical invasion or not, where a proposed operation or connection creates significant new carrier competitive relationships, two clear decisions of this Court require the Commission to resolve the new economic equation, and to permit the proposed operation only if it (the Commission) is satisfied that public benefits are probable. This was the holding in *Alabama & Vicksburg*[13] as in *Piedmont*,[14] both decisions stressing (as did the Commission here) that the connection, if constructed, would establish new through routes and alter irrevocably existing carrier competition. After observing the traffic relationships among carriers for over 50 years, Congress in the 1920 Act determined[15] that these competitive relationships could be altered by constructing new facilities only if the Commission were convinced that the public good would be enhanced by the proposed construction. The Commission, not the district courts, was established as the body to gauge both the competitive impact of a proposed connection and its public effect. This the Commission did, noting how operation of connecting tracks which permit the creation of new competitive through routes has uniformly been held subject to its § 1 (18) jurisdiction (R. 298-299) and finding (R. 312) that the diversion caused by this new connection would ultimately injure the public by impairing existing carriers' ability to provide an already adequate service. Its mandate to measure this competitive impact is of course laid down in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299 at 310-312,[16] and the

13. See pages 10-11 of North Western's brief.

14. *Piedmont & N. Ry. Co.* v. *I.C.C.*, 286 U.S. 299, set out at pp. 14-15 of our brief here.

15. See pages 14-15 of our brief herein.

16. See pages 14-15 of our brief herein.

Alabama & Vicksburg case,[17] reinforced by the requirements of the *Yonkers* cases.[18] While certain turn of the century cases upon which appellees (like the lower court) rely[19] do suggest that the court, not the Commission, ought to apply these statutory tests to any proposed construction, the context in which those decisions arose has long since disappeared.

Mr. Justice Brandeis in the *Texas & Pacific* case[20] reasoned at that time that the only remedy for a person protesting new construction or operation for which the carrier sought no I.C.C. authority lay in an action under § 1(20)[21] in a one-judge court. It followed, therefore, that the court alone ought to determine the jurisdictional issue, in deciding whether or not to force the parties before the Commission. But since that time as this record (R. 125) reveals, the Commission has evolved a practice of itself bringing reluctant railroads before it to resolve that issue. This was done also in the *Toledo Interchange* case (Appendix 14 at page 18) and this practice was noted by Judge Friendly in *Long Island R.R.* v. *New York Central R. Co.*[22]

Since the Commission has shown itself fully competent to cope with unauthorized expansion and to apply trans-

17. See pages 10-12 of our brief herein.

18. See pages 21-22 of our brief herein.

19. *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

20. *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266.

21. *Id.* at 273-274.

22. Noted at length at pages 28-29 of our brief herein, the decision is printed at 281 F.2d 379, 383-384 (2d Cir. 1960).

portation standards to these statutory criteria, there should be no occasion any longer for complete judicial redecision of this indispensable finding of jurisdiction or its lack. The more recent decisions by the federal courts, uniformly affirmed here,[23] hold that instead of inventorying physical facilities and counting the ties and feet of track, the Commission is to determine the significance of new connections by their commercial and competitive import, and that its analysis of these factors, if supported by precedent and the agency's record, will be sustained.

Like the District Court for Northern Illinois,[24]

> "We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized."

If so, the lower court erred significantly in holding I.C.C.'s action "incidental (R. 388)" and ruling this connection "too small a matter to require the attention of the Interstate Commerce Commission . . . (R. 391)," because, as this Court ruled recently in *United States* v. *Drum*, 368 U.S. 370 at 376, where the Commission's resolution of this issue is consistent with the coherent body of administrative and judicial precedents so far developed in this area,

23. *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D. Ill. 1962), aff'd. 373 U.S. 378; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga. 1957), aff'd. 356 U.S. 273.

24. *State of Illinois* v. *United States*, 213 F. Supp. 83 at 89 (N.D. Ill. 1962), aff'd. 373 U.S. 378.

there is no occasion for the District Court to disturb its conclusion.

Respectfully submitted,

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October, 1964

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

Interstate Commerce Commission

Finance Docket No. 19786[1]

GREAT SOUTHWEST RAILROAD INC., ET. AL.—
CONSTRUCTION, ETC.

Decided June 3, 1958.

1. Certificate issued authorizing (a) construction, acquisition, and operation by Great Southwest Railroad, Inc., of a line of railroad within and serving property being developed as an industrial district by Great Southwest Corporation; (b) construction and operation by The Texas & Pacific Railway Company of a line of railroad connecting its main line with the line of Great Southwest Railroad, Inc.; and (c) operation by the Chicago, Rock Island & Pacific Railroad Company, in interstate and foreign commerce, of an existing interchange track extending from a connection with its main line to a connection with the line of Great Southwest Railroad, Inc., all in Tarrant County, Tex. Conditions prescribed.

2. Authority granted to Great Southwest Railroad, Inc., to issue not exceeding 12,000 shares of common stock of the par value of $100 per share.

REPORT OF THE COMMISSION

Division 4, Commissioners Mitchell, Arpaia, and McPherson

[1] This report also embraces Finance Docket No. 19787, Great Southwest Railroad, Inc., Stock.

By Division 4:

The Great Southwest Railroad, Inc. (Great Southwest), on June 3, 1957, applied under section 1(18)-(20) of the Interstate Commerce Act, as amended, for authority to construct and operate a line of railroad, or to acquire and operate segments of a line previously constructed by others, to serve property being developed as an industrial district by Great Southwest Corporation (development corporation) and plants located therein. The line would extend from a proposed connection with the line of the Chicago Rock Island and Pacific Railroad Company (Rock Island) at the northern boundary of the industrial district, near Dorothy, to a proposed connection with The Texas and Pacific Railway Company (Texas & Pacific) at the district's southern boundary, near Orme, approximately 6.86 miles, together with 2.97 miles of secondary tracks, all in Tarrant County, Tex., Finance Docket No. 19786.

Coincidentally therewith, Great Southwest applied under section 20a of the act for authority to issue not exceeding $1,200,000 of common stock, consisting of 12,000 shares of the par value of $100 each, Finance Docket No. 19787.

The Texas & Pacific, the Rock Island and several railway labor organizations intervened in the proceedings as their interests might appear. The applications were consolidated for hearing and a hearing was held, at which time Great Southwest stipulated that it seeks a certificate and authorization to operate only as a terminal switching railroad to the property involved. Service of a proposed report in these proceedings was waived by the parties thereto. No representations have been made by State authorities. All points mentioned herein are in Texas unless otherwise stated.

Subsequent to the hearing, the Rock Island, a common carrier by railroad subject to the provisions of part I of the act, on March 3, 1958, filed a supplemental application in these proceedings under section 1(18)-(20) of the act requesting authority to extend its line by operating in interstate or foreign commerce an existing interchange track, a portion of which is known as the Dorothy Spur, which connects with Rock Island's main line at Dorothy and extends to a connection with the line proposed to be constructed or acquired by the Great Southwest, approximately 1.79 miles in Tarrant County, Tex.

By second supplemental application filed March 27, 1958, in these proceedings, the Texas & Pacific, also a common carrier by railroad subject to the provisions of part I of the act, applied under the same section for authority to construct a line of railroad extending from a point on its main line at milepost 231.26 to a connection with the proposed line of Great Southwest, approximately 2,865 feet, in Tarrant County, Tex. Contemporaneously with the filing of the supplemental application, Texas & Pacific filed a motion to dismiss its application, alleging that we were without jurisdiction in the matter. Subsequently, the motion was withdrawn without prejudice to the right of that company again to raise the same jurisdictional question in subsequent proceedings. As shown in the following discussion, however, the proposed line of the Texas & Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the construction and operation contemplated by the Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244.

The Great Southwest is a Texas corporation organized by the development corporation to construct or acquire,

own, maintain and operate a line of railroad involved in its application. Its capital stock, consisting of 12,000 shares of the par value of $100 per share, has been subscribed for by individuals who are financially interested in or otherwise closely associated with the development corporation. Under present plans, the stock subscribed for by these individuals, with the exception of one share each, will, when issued, be held by them in trust for or transferred to the development corporation.

The development corporation was formed primarily for the purpose of providing industrial sites and encouraging industrial growth in the Arlington-Grand Prairie area. Based on favorable studies made by research organizations and specialized consultants, it was concluded that the Fort Worth-Dallas area is a dominant distribution center for a territory embracing the States of Texas, Oklahoma, Arkansas, Louisiana, New Mexico, Mississippi, Kansas, Colorado, Missouri, Tennessee, Alabama and Arizona. As a result, the development corporation has presently invested in excess of $10,000,000 in the purchase and development of certain land in the area. It now owns or controls, by long-term lease, 3,000 acres of land within the city limits of Arlington and Grand Prairie, situated midway between Fort Worth and Dallas. The main-line tracks of the Rock Island generally parallel the northern boundary of the property approximately 2 miles to the north thereof. The Amon Carter Field (an airport constructed by the city of Fort Worth) lies to the north of the trackage. The property is bounded on the south by U. S. Highway 80. The main tracks of the Texas & Pacific between Fort Worth and Dallas are adjacent to and parallel the highway. The Dallas-Fort Worth Turnpike bisects the district in an East-West direction and the future Great Southwest Expressway (now State Highway 360) bisects the property in a North-South

direction. The district presently is being developed into a planned industrial area which will not only provide plant sites for prospective industries, public warehousing, and recreational facilities for employees but will provide public utility services, including rail transportation to the industries locating therein. At the present time the development corporation has under construction the first unit of its pubilc warehouse which will contain 190,000 square feet of storage space, a club-restaurant, a sports center, and 3 multi-purpose industrial buildings totaling 100,000 square feet which are now available for sale or lease. All streets and drainage structures, together with the sanitary sewer, water, and initial gas lines, have been installed north of the turnpike. Electric power and telephone lines were being installed at the time of the hearing in this proceeding. Negotiations with numerous prospective customers for plant sites disclose that all will require rail service and sidings.

The district, designed to attract manufacturing and distribution industries, has been planned to afford all locating therein a connection with the Texas & Pacific and the Rock Island railroads. At the outset, the development corporation endeavored to make available the services of both carriers over a single set of tracks, but that plan proved unworkable. Under the circumstances, it was decided to organize Great Southwest. Meanwhile, for the purpose of having immediate rail service needed to develop the property, the development corporation entered into a letter agreement, dated June 4, 1957, with the Rock Island, in which the latter agreed to project its Dorothy spur south to the proposed point of connection with the district's lead track No. 1 on the northern boundary of the area. Rock Island further agreed to construct such other proposed lead tracks as the development corporation requested,

and, when completed, render service as the demands of the available traffic required. Under the agreement, Rock Island would not be required to construct any tracks considered as industrial tracks or sidings, and, in the event Great Southwest is certificated by us, it shall have the immediate right to purchase all facilities constructed by Rock Island within the district at cost, less accrued depreciation.

Subsequently, the development corporation, the Great Southwest, and the Texas & Pacific entered into an agreement, dated November 12, 1957, whereby the development corporation will donate a right-of-way easement over its property reasonably sufficient to build, and the Texas & Pacific will construct, at its own expense, a bridge across U. S. Highway 80 and tracks from the northern end of such bridge to a connection with the tracks of Great Southwest, as well as suitable and adequate interchange tracks. The agreement further provides that the service area served by Great Southwest shall be placed within the switching limits of the station "Great Southwest" to be established on the Texas & Pacific. Great Southwest shall publish on both intrastate and interstate traffic a terminal switching charge of $17.61 per car, augmented by any increases heretofore or hereafter prescribed or permitted by the Railroad Commission of Texas or by this Commission. It is further agreed that, in the event of the sale or lease of all or any portion of the line of railroad of Great Southwest or all or a portion of its capital stock by the development corporation, the Texas & Pacific and the Rock Island shall have an option, either jointly or severally, to lease or acquire such property or stock. A similar agreement, except for location of trackage, was executed with the Rock Island and is filed with the latter's supplemental application herein.

Except for trackage to be constructed by Rock Island as a result of the above-described letter agreement, Great

Southwest will construct the trackage within the industrial area. Construction will begin within 45 to 60 days after the receipt of the necessary authority from us, and it is expected that the trackage to be initially constructed can be completed within 4 months after the work is started. This trackage will consist of a single, standard-gage main line lead track of 90-pound rail and such secondary tracks as may be required. On the portion of the line to be acquired from the Rock Island there will be no complete wooden trestles, but there will be one 50-foot deck-plate girder bridge with wooden trestle approaches consisting of 3 panels on each end. The approximate length of each end is 42 feet and the height 25 feet. While it is not contemplated to construct the entire railroad at the outset, the cost of the trackage program as presently planned, consisting of 6.217 miles of main lead track and 4.814 miles of secondary track, with all necessary appurtenances including structures and roadway machines, is estimated to be $848,599. Total cost of equipment (rolling stock) which applicant considers necessary to conduct its operations is estimated to be $181,671.

Applicant estimates that traffic volume will total 5,532, 9,528, 13,512, 17,040, and 20,592 loaded cars inbound and outbound during the first 5 years of operation. System operating results for the same 5-year period are estimated as follows: Operating revenues (based on a switching charge of $18.49 per car) $102,287, $176,173, $249,837, $315,070, and $380,746; operating expenses $160,054, $160,054, $172,021, $179,677, and $193,822; and net railway operating income, $71,335 (deficit), $2,651, $64,081, $66,139, and $88,426 (profits).

As heretofore stated, Great Southwest seeks authority to issue not exceeding $1,200,000 of common capital stock, consisting of 12,000 shares of the par value of $100 each, to be

sold at par and the proceeds used to construct, acquire, and operate the above-mentioned line of railroad. These shares represent the entire capital stock of Great Southwest and have been subscribed in equal amounts by 10 individuals, each of whom is financially interested in or closely associated with the development corporation. When issued, all the stock except one share per person will either be held by the 10 individuals in trust for the development corporation or will be transferred to the latter.

The balance sheet of Great Southwest as of May 31, 1957, shows the following items: Cash $60,000, development cost $1,249, organization expense $750 and capital stock subscriptions payable $1,140,000, total assets $1,201,999; accounts payable $1,999, and capital stock, 12,000 shares authorized and subscribed at $100 per share, $1,200,000.

Rock Island seeks authority to extend its line by operating in interstate or foreign commerce approximately 1.79 miles of an existing track. No new construction and no additional expenditures are required. The line in question is composed of 2 segments, one of which has been in existence for many years and is known as "Dorothy Spur". The other segment was recently constructed to form the connecting link between the spur and the industrial district's lead track No. 1. If the authority requested by Great Southwest is granted, the line will be used to effect an interchange between the 2 carriers.

By its second supplemental application Texas & Pacific requests authority to construct a line of railroad connecting its main line with the line of Great Southwest, as specified in the agreement dated November 12, 1957. The line will extend from a turnout in its main line at milepost 231.26 in Arlington, overpass U. S. Highway 80, and connect with Great Southwest at a point within the southern boundary

of the industrial district, a distance of approximately 2,865 feet. All surveys, plans and specifications have been completed and construction was actually commenced on January 15, 1958. It is scheduled for completion on June 1, 1958. The trackage will be standard gage, consisting of 110- to 115-pound rail. No helper grades will be used and no wooden trestles, or other temporary construction, are contemplated. Cost of such construction is estimated to be $111,628 and will be entirely financed out of the treasury of Texas & Pacific. The traffic derived from the operation thereof will constitute net additional business and will not be diverted from existing railroads.

It is clear that construction, acquisition, and operation by Great Southwest will enable the development of the industrial area and that the industries and facilities locating therein will benefit from the service to be performed. It is also clear that the line to be constructed by the Texas & Pacific and the extension of existing trackage by the Rock Island are essential to the functioning of Great Southwest. However, the application should not be approved without restriction. We have held in numerous cases that the formation of independently operated lines to serve as feeders for existing carriers is not conducive to the creation of an efficient and economical transportation system. In some instances of this nature, applications have been approved upon the condition that applicant tender the railroad companies operating the connecting lines 10-year options under which the latter might acquire control of the applicant, or its properties, upon fair and reasonable terms, subject to our approval. See *Unity Rys. Co. Construction*, 247 I.C.C. 665, and cases cited therein. See also *Parr Term. R. Acquisition*, 275 I.C.C. 690. While the provisions in the contracts of November 12, 1957, with Texas & Pacific, and of February 20, 1958, with Rock Island, likewise grant op-

tions to the trunkline carriers to acquire or lease the property and stock of Great Southwest, they become effective only in the event that at some future date the owners of such property desire to lease or sell. As in the cases cited, we are of the opinion that the options should be immediate and unconditional. Under the circumstances, the instant application will be granted only upon the condition that, within 30 days from the effective date of our order herein, Great Southwest tender to the Rock Island and the Texas & Pacific a 10-year option under which those carriers may acquire joint and equal control of Great Southwest, or the purchase of its properties.

Subject to the above conditions we find that the present and future public convenience and necessity require (a) construction, acquisition, and operation by Great Southwest Railroad, Inc., of a line of railroad within the industrial district of the Great Southwest Corporation; (b) construction and operation by The Texas and Pacific Railway Company of a line of railroad extending from a connection with its main line at milepost 231.26 to a connection with Great Southwest Railroad, Inc., at a point near the southern boundary of the industrial district, and (c) operation by the Chicago, Rock Island and Pacific Railroad Company in interstate and foreign commerce of an existing interchange track extending from a connection with its main line near Dorothy to the point of connection with Great Southwest Railroad, Inc., at the northern boundary of the industrial district, all as described herein.

We further find that the proposed issue by the Great Southwest Railroad, Inc., of not exceeding 12,000 shares of common stock of the par value of $100 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance

by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate certificate and order will be issued which will provide that the construction shall be commenced on or before September 1, 1958, and be completed, at least insofar as the trackage of The Texas and Pacific Railway Company and the main lead track of Great Southwest Railroad, Inc., are concerned, on or before March 1, 1959. The certificate also will contain provisions with respect to the tender and filing of the option, the filing of tariffs, and the submission of journal entries.

Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 3rd day of June, A. D. 1958.

Finance Docket No. 19786

Great Southwest Railroad, Inc., et al.—Construction, Etc.

Finance Docket No. 19787

Great Southwest Railroad, Inc., Stock

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require (a) construction, acquisi-

tion, and operation by the Great Southwest Railroad, Inc., of a line of railroad within the property being developed by the Great Southwest Corporation as an industrial district; (b) construction and operation by The Texas and Pacific Railway Company of a line of railroad connecting its main line with the trackage of the Great Southwest Railroad, Inc., and (c) operation by the Chicago, Rock Island and Pacific Railroad Company, in interstate and foreign commerce, of an existing interchange track connecting its main line with the trackage of Great Southwest Railroad, Inc., all in Tarrant County, Tex., described in the report aforesaid: *Provided, however,* and this certificate is issued on the express condition, that within 30 days from the date of this order, the Great Southwest Railroad, Inc., shall tender to The Texas and Pacific Railway Company and the Chicago, Rock Island and Pacific Railroad Company a 10-year option under which those carriers may, at any time within that period, acquire joint and equal control or ownership of the railroad properties of Great Southwest Railroad, Inc., upon fair and reasonable terms, subject to the approval of this Commission, and *provided, further,* that construction shall be commenced on or before September 1, 1958, and be completed insofar as the main lead track of Great Southwest Railroad, Inc., and the trackage of The Texas and Pacific Railway Company are concerned, on or before March 1, 1959;

It is ordered, That the Great Southwest Railroad, Inc., and The Texas and Pacific Railway Company shall report, in writing, the commencement and the completion of the construction authorized herein within 15 days after such commencement and completion, respectively, and that the Great Southwest Railroad, Inc., furnish a copy of said option within 15 days after the date of its execution;

It is further ordered, That the Great Southwest Railroad, Inc., The Texas and Pacific Railway Company, and the Chicago, Rock Island and Pacific Railroad Company, when filing schedules establishing rates and charges applicable to said lines of railroad, shall in such schedules refer to this certificate by date and docket number;

It is further ordered, That the Great Southwest Railroad, Inc., be, and it is hereby, authorized to issue not exceeding 12,000 shares of common stock of the par value of $100 each;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged or otherwise disposed of by the Great Southwest Railroad, Inc., unless or until so ordered or approved by this Commission;

It is further ordered, That the Great Southwest Railroad, Inc., shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the Great Southwest Railroad, Inc., shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, division 4.

HAROLD D. McCOY
Secretary

(SEAL)

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 19922.

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY ET. AL.
TRACKAGE RIGHTS, ACQUISITION, ETC.

Decided October 28, 1958

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1. Acquisition by the Toledo, Peoria & Western Railroad Company and the Chicago & North Western Railway Company of trackage rights over each other's tracks in the Peoria, Ill., area, approved and authorized. Conditions prescribed.

2. Certificate issued approving and authorizing operation by the aforesaid carriers of a connecting track in the Peoria, Ill., area.

3. Application in all other respects, dismissed.

Division 4, Commissioners Mitchell, Arpaia, and McPherson.

BY DIVISION 4:

No exceptions to the report proposed by the examiner were filed.

The Toledo, Peoria & Western Railroad Company and the Chicago and North Western Railway Company, common carriers by railroad subject to the provisions of Part I of the Interstate Commerce Act, referred to as the Toledo and the North Western, respectively, on September 9, 1957, filed a joint application, as amended, (1) under section 5 (2) of the act for authority (a) to the former to operate

under trackage rights over approximately 5.9 miles of main track of the latter extending through Sommer,[1] and (b) to the North Western to operate under trackage rights over approximately 4 miles of main track of the Toledo, extending from Sommer to a point west of Mapleton, and over 2.56 miles of track, partly completed, from Mapleton to Kingston Lake, and (2) under section 1 (18) of the act for approval of construction by applicants of a connecting track, about 519.8 feet in length, joining their main lines at Sommer, and for authority to operate thereon, all in the environs of Peoria, Ill., as more specifically described in the application and in exhibit 7 attached thereto and made a part thereof; or, in the alternative, for a finding that the proposed trackage rights exchange and the construction and operation of the connecting track are within the exemptions of section 1 (18)-(22) of the act and therefore not under our jurisdiction. No representations have been made by any State authority. The Central Illinois Light Company, the Olin Mathieson Chemical Corporation, The United Electric Coal Companies, the Truax Traer Coal Company, and Hollis Township, Peoria County, Ill., intervened in support of the application. The Peoria & Pekin Union Railroad Company, referred to as the Pekin Union, and the Minneapolis & St. Louis Railway Company[2] intervened

1. Extends from a North Western connection with track serving the Keystone Steel & Wire Company to the crossing of the Illinois River.

2. The purpose of its intervention was to state its position as to the application of a trackage-rights agreement relating to the operation by the North Western of coal trains over tracks of the former from Fulton County, Ill., coal mines to Iowa Junction in or near Peoria, but it does not appear that such an agreement has any material relevancy here.

in opposition, and the Keystone Steel & Wire Company as its interest might appear. A hearing was held on April 7-11, 1958, at Peoria, Ill. Briefs have been filed. Unless otherwise stated, all points hereinafter mentioned are in Illinois.

The Toledo operates in interstate commerce a main line of railroad extending from its eastern terminus at Effner on the Indiana-Illinois State line, through Peoria, to its western termini at Keokuk, Iowa, and Lomax, Ill. In *Toledo, P. & W. R. Co. Control,* 295 I.C.C. 523, decided May 31, 1957, acquisition by the Atchison, Topeka & Santa Fe Railway Company and the Pennsylvania Company of control of Toledo, through ownership of stock was authorized, but the transaction has not been consummated because of pending court litigation. The North Western operates in interstate commerce a line of railroad in Illinois and other States. The Central Illinois Light Company is an Illinois public utility engaged in generating and selling electricity in Peoria. The United Electric Coal Companies and the Truax Traer Coal Company are coal-mining companies operating in Illinois and other States. The Olin Mathieson Chemical Corporation is engaged in the operation of chemical plants, including one in the vicinity of Peoria. The Pekin Union[3] is a switching carrier in the Peoria switching district, handling interstate shipments. The Minneapolis & St. Louis operates in interstate commerce a line of railroad in Iowa, Illinois, and other States. The Keystone Steel & Wire Company

3. 38 percent of its stock is owned by the Illinois Central Railroad Company, the largest single stockholder, 12.5 percent by the North Western, and the remainder is owned by the Peoria & Eastern, the New York, Chicago & St. Louis, the Pennsylvania and the Chicago & Illinois Midland railroad companies.

is engaged in the manufacture of steel and steel products at its factory in Peoria, and Hollis Township, as its name implies, is a State municipality.

The exchange of trackage rights between applicants, involves no cash consideration. It is proposed to conduct such operations in accordance with an agreement, which covers also the construction and operation of the connecting track, entered into between applicants on July 25, 1957, subject to our approval of the application. Under the terms of the agreement, the parties grant to each other the right to operate trains upon each other's tracks and either or both parties have the right to serve all industries now located or to be thereafter located within the industrial area as outlined in the aforementioned exhibit 7 and hereafter referred to as the industrial area, either directly with its own power or through an operating arrangement with the other party upon such terms and conditions as may be agreed upon. The cost of construction and maintenance of the connecting track, which has already been constructed and operated, as hereinafter stated, will be at the sole expense of the Toledo, but each party at its sole expense will maintain the portion of its individually owned trackage. Other provisions relate to the construction of the industry track to Kingston Lake and other industrial tracks, and matters usually incorporated in trackage agreements not specifically mentioned herein. Either party has the right to terminate the agreement upon 6 months' notice in the event we permit it to abandon its portion of the trackage to be jointly operated, subject to an option to the other party to purchase such trackage. The agreement is to become effective as of the effective date of our order approving the application, and is to remain in full force and effect until otherwise terminated, as above stated. The connecting track

was constructed at a cost of $25,468 and was operated in interchange between applicants of through traffic, as well as traffic for delivery in the industrial area, from March 5, 1957 to about March 22, 1958, when operation was suspended pending outcome of this proceeding. The connecting track originally was constructed to serve industrial plants located or to be located on each party's industrial tracks as well as on jointly owned industrial trackage and as such was considered by applicants to fall within the exemption contained in section 1(22) of the act. After the connection was constructed, they decided also to use it as an interchange track for through carload traffic. The carriers proceeded upon the theory that such construction is a matter not within our jurisdiction. The application for our approval thereof was filed as a result of inquiry by our Bureau of Finance with respect to the matter after the application to acquire trackage rights was filed disclosing that a connection had been constructed without authority. The applicants now contend that both transactions are exempt either under the provisions of section 1 (18) or 1 (22) of the act.

Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244. Furthermore, the proposal to serve industries on each other's lines appears in the nature of an invasion of territory of another carrier, no adjudication of the rights of the parties to serve each other's industries directly having ever been made. See *Texas & P. R. Co.* v. *Gulf, C & S. F. R. Co.*, 270 U.S. 266.

The principal purpose of the application is to enable both applicants to serve directly the entire industrial area, hereinafter described, without duplication of existing tracks, and to permit direct interchange of traffic be-

tween them instead of through the medium of the Pekin Union, as is the case at present.

The industrial area is immediately south of Peoria on the west side of the Illinois River. It is a long, narrow strip of land consisting of some 6,000 acres, zoned for heavy industrial use. The northern half of the area's western boundary is closely paralleled by a main line of the North Western, which crosses the area about midway, and the southern half by a main line of the Toledo, which proceeds to Peoria. The line of the former serves an industry in the northern portion of the area and the line of the latter serves industries in the southern portion. The Toledo owns property throughout the area. Lines of the Pekin Union and the Peoria Terminal Company extend also along the northern half of the western boundary.

The Keystone Steel & Wire Company, located 2 or 3 miles north of the Sommer interchange, and the Olin Mathieson Chemical Corporation, about 1.5 miles southwest of Sommer, are the principal industries in the industrial area. The former is one of the largest shippers in the Peoria area. Its steel mill, on the east side of the North Western main line, is served by the Pekin Union and the North Western and its wire mill, on the west side of the North Western line, is served by the Peoria Terminal and the Pekin Union. The plant ships about 50 or 60 carloads a month to Pacific coast and southwest points over various rail routes. The company's general traffic manager estimated a saving of one day in transit on such traffic, if direct interchange between applicants is permitted at Sommer and favors a direct interchange, but the witness did not know whether any of such traffic had moved over the interchange while in operation. The plant of Olin Mathieson, located on the line of the Toledo, was constructed in 1957 and was scheduled to commence opera-

tions on May 1, 1958. It was engaged in the handling of automotive products, such as anti-freeze. Its basic products are manufactured at plants in other States and will be shipped in by barge to storage tanks, which now contain 6 million gallons. The product is to be processed further at the plant where it will be packed or canned and distributed by truck or rail to automotive concerns. The company's assistant traffic manager estimated plant production for 1958 at 70,000 tons, of which probably 65 percent will move by truck and 35 percent by rail. About 90 percent of annual production is intended for shipment within a period of 4 months. The witness estimated a saving of one day in transit if the traffic is interchanged directly between applicants at the Sommer interchange. He does not expect the Pekin Union to participate in any of the plant's traffic because of the additional switching movement that would be involved. One of the factors in the selection of the plant site was the expected services from two rail carriers.

The United Electric Coal Companies maintain dock facilities at the southern boundary of the industrial area. The International Mineral & Chemical Corporation of Chicago is planning construction of a warehouse for storage of phosphate at Kingston Lake on the southern portion of the industrial area. The plant was designed for a capacity of about 3,500 tons. The inbound traffic is expected to move in by barge for distribution by rail. The company intends to furnish raw materials to fertilizer manufacturers in a large area. The company's director of transportation estimated plant distribution in the area at 400 carloads a year, and considers advantageous the direct service of the North Western, which would enable direct delivery of the plant's products to North Western points. A Peoria realtor, who is interested in industrial develop-

ment and has been instrumental in locating industries in the industrial area, considers that area most desirable for industries and is of the opinion that the area would develop more rapidly with services from two railroads. The manager of the Quaker Oats Company of Chicago[4] and others not specifically mentioned herein also expressed the opinion that the Sommer interchange would provide faster and more economical service than the service now available over the present route.

The Illinois Light Company, hereinafter referred to as the power company, generates electricity at its R. S. Wallace station in the East Peoria area and also at its Liberty Street station in Peoria, with capacities of 315,000 and 20,000 kilowatts, respectively. It supplies electricity and natural gas to 105 communities in the Peoria, Springfield, and Lacon areas, and furnishes steam heating to downtown areas in Peoria and Springfield. The territory served comprises roughly 2,586 square miles with a total population in excess of 446,000 inhabitants. In 1957, the company served 118,000 electric consumers, over 98,000 users of gas, and 926 steam-heat consumers. It is served exclusively by the Toledo either in switching or in both switching and line-haul services, depending upon the route of movement of the traffic.

The power company is now in the process of constructing in the industrial area an electric generating plant, referred to as the La Marsh plant, at an estimated cost of 26 million dollars, to be completed in 1960. The construction has been authorized by the Illinois Commerce Commission. The plant will be located on a 172-acre tract on the west side of the Illinois River adjacent to the con-

4. Shipped some 45 carloads a month through the Sommer interchange while in operation.

necting track at Sommer. Lines of the Peoria Terminal, the North Western, the Toledo, and an old right-of-way (crossing the North Western line) of the Pekin Union are located in the immediate vicinity of the proposed La Marsh plant. The applicants have partially completed industrial tracks[5] from the North Western line to the plant's proposed yard tracks. Construction of a switching track direct from the Toledo line to the plant requires crossing over the North Western line, and negotiations between the parties for such a crossing led to the execution of the trackage-rights agreement. Applicants do not concede that the Pekin Union has title to the old right-of-way referred to, but determination of that question is unnecessary in the disposition of this proceeding.

The new plant will be operated by steam power, using coal for fuel. Its initial unit will have a maximum capacity of 125,000 kilowatts. The company's vice president in charge of operations estimated the plant's coal consumption at 350,000 tons a year until such time as additional units are installed. The eventual capacity of the plant is expected to reach, sometime after 1970, one million kilowatts, which would require additional coal for its operation, and is expected eventually to supply approximately 50 percent of the company's total electricity generated at all its stations. The plant's output will be fed into the company's transmission system or neighboring utilities.

The supply of coal by rail for the operation of the La Marsh plant is to some extent dependent upon availability of services from two line-haul rail carriers and a coal rate

5. Construction of industrial tracks to serve plants within the industrial area is provided for in the trackage-rights agreement.

of 63 cents per ton, published from Fulton County coal mines, over the Toledo line. The rate from the same coal mines to the R. S. Wallace station is 92 cents per ton, which presumably would be applicable on shipments to the new plant over the present route in connection with the Pekin Union.[6] The United Electric Coal Companies operate 2 mines in Fulton County, located on the Toledo and the Chicago, Burlington & Quincy Railroad. In 1957, the coal company supplied the power company, for use at the latter's Peoria plants, 220,000 tons of coal, of which 90 percent moved over the Toledo and 10 percent on the Chicago, Burlington & Quincy line. The billing point for coal from the Toledo mine is Cuba, a point 29 miles from Sommer. The coal company expects to sell its coal to industries in the industrial area, particularly the new power plant, and, while there have been negotiations with the power company for coal purchases, no agreement has been signed. The Truax Traer Coal Company operates mines in Illinois, one of which is located at Fiatt on the Chicago, Burlington & Quincy, approximately 50 miles from Sommer, and the other, at St. David[7] on both the Toledo and the Chicago, Burlington & Quincy lines. The power company received at its Peoria plants from the coal company 225,000 tons of coal in 1957, of which 170,000 tons moved over the Toledo and the remainder on the

6. Application of this rate would increase transportation charges $101,500 a year, based on estimated traffic and such increase would ultimately be borne by the consumer under a fuel-cost adjustment on file with the Illinois Commerce Commission. In the case of the largest customers, estimated increases would range from $1,200 to $23,000, but the increase in the case of each residential consumer would be negligible.

7. The billing point is some 24 miles from Sommer.

Chicago, Burlington & Quincy. This coal company also expects to furnish a substantial volume of the coal tonnage for the operation of the new power plant, but it has no definite commitments.

Officials of the power company are determined to obtain the services of both the North Western and the Toledo, as well as the benefit of the rate of 63 cents a ton on coal over the Toledo line. They are definitely opposed to the coal traffic moving over the Pekin Union because of the higher rate applicable over that route. If unable to attain their objective, they propose to make arrangements for the receipt of the coal by water or truck at a rate comparable to the 63-cent rail rate.

The North Western is to Peoria a north-south carrier. It has a main line between Chicago and St. Louis, Mo., passing west of Peoria through a point known as Kickapoo Junction, thence through Sommer and across the Illinois River through South Pekin, where it maintains a classification yard. Peoria proper is served by the North Western over a track diverging from the main line at Kickapoo Junction to the North Western's Adams Street yard, a distance of about 1.9 miles. Under schedules effective in January 1958, the North Western operates 3 trains daily in each direction, 2 of which are high-speed and the other is on a slow-speed schedule. The slow-speed southbound train arrives at the Adams Street yard at 9:30 p.m.; and the 2 high-speed southbound trains arrive at the South Pekin yard at 6 a.m. and 6 p.m. On the northbound run, the slow-speed train departs from the Adams Street yard at 3:45 a.m.,[8] and the 2 high-speed trains depart from the South Pekin yard at 6:45 a.m.[9]

8. Originates at South Pekin.

9. Departs from Madison, Ill. (E. St. Louis), at 1 a.m.

and 7:30 p.m.,[10] respectively. The high-speed trains are not scheduled to stop at the Adams Street yard and the only regular outbound train available at that point is the slow-speed train. On the southbound traffic the slow-speed train terminates at South Pekin. All southbound traffic destined to Peoria proper or for interchange with the Toledo is delivered at the Adams Street yard. Such traffic is either held en route at Nelson, which is a junction point on the North Western's Chicago-Omaha line about 80 miles north of Peoria, awaiting the slow train, or is sometimes moved by the high-speed trains all the way to the South Pekin yard to be later returned to the Adams Street yard.

The Toledo is to Peoria an east-west line. It operates from its western termini over its own line to a point known as Hollis, which is located a few hundred feet north of the connecting track at Sommer, thence under trackage rights,[11] for a distance of approximately 7.5 miles, over lines of the Peoria Terminal and the Chicago, Burlington & Quincy to a connection with its own track near the west end of its Illinois River bridge in Peoria, proceeding over its own track for a distance of 2 or 3 miles to its classification yard, known as the Farmdale yard in East Peoria, where the Pekin Union delivers interchange traffic to the Toledo. The remainder of the Toledo main line extends from the Farmdale yard to the carrier's eastern terminus of Effner. The Toledo operates eastward 3 trains arriving at Peoria at 8:40 a.m. and 9:57 p.m. daily, and 9:25 a.m. triweekly, and 3 daily trains departing at 2 a.m., 12:01 p.m., and 6 a.m. On the westward run 3 daily trains

10. Departs from Madison, Ill., at 1:30 p.m.

11. Operates over 686 feet of its own track which connects the Peoria Terminal and Chicago, Burlington & Quincy segments.

arrive at Peoria at 10:48 a.m., 6:48 p.m., and 10:33 p.m., and 3 trains depart at 6 a.m. triweekly, and 1 p.m. and 9:30 p.m. daily.

The line of the Pekin Union, consisting of approximately 145 miles of switching tracks, extends generally from Pekin on the east side of the Illinois River to its East Peoria yard, which has a capacity of 2,000 cars, thence westerly across the river, and southerly to the end of the line at a point about 2 miles north of Sommer. Of the 14 railroad lines entering Peoria, 7 are tenant lines of the Pekin Union. All road trains of the tenant lines, except the North Western, terminate at the Pekin Union East Peoria yard. The Pekin Union performs all deliveries or switching within the Peoria switching district for the tenant lines and operates for the North Western the Adams Street yard, where its line connects with that carrier's line. It serves 94 industries in the Peoria area, of which 84 are served exclusively, in addition to 47 other industries located on its team tracks.

The interchange of traffic between applicants at Peoria is effected by a switching movement, performed by the Pekin Union, from the Adams Street yard to the Toledo's East Peoria yard, a distance of approximately 5.4 miles, passing through the switching carrier's 90-91 yard and its East Peoria yard. Traffic in the opposite direction is switched from the Pekin Union East Peoria yard, where such traffic is received from the Toledo, to the Adams Street yard. The switching services performed by the Pekin Union for the North Western include the segregation of North Western's cars from its own trains as well as from Toledo trains, all of which entails considerable switching, as shown by exhibits received in evidence indicating train position of cars when received by the Pekin Union. The switching of the traffic by the Pekin Union

involves one classification at the East Peoria yard and another at the Adams Street yard and might involve still another at the 90-91 yard. In order to make morning delivery to Peoria industries, the Pekin Union prefers receiving cars from its connecting railroads by 1 p. m., or not later than 6 p. m. of the preceding day, depending upon the industry. The Pekin Union switches to the Toledo yard twice a day and receives traffic from the latter only once a day. The former arranges its operations to make connection with the 3:45 a. m. North Western train out of Peoria.

Carload traffic interchanged in the Peoria area between applicants for the 4 years 1954-57 amounted, in order, to 3,911, 5,165, 4,486, and 4,603. Traffic interchanged in 1957 between the Toledo and all other carriers in the Peoria area was 73,193 carloads, of which 4,603,[12] as stated, was traffic interchanged with the North Western and the remainder with other carriers. The preponderance of traffic interchanged between these two carriers generally moves into Peoria from the north on the North Western and out of Peoria to the east on the Toledo and in the reverse direction.

As heretofore stated, applicants propose to substitute direct interchange of traffic between them at Sommer, in lieu of the switching provided by the Pekin Union, and to operate over each other's tracks. A direct line-haul movement would be available to either the North Western or the Toledo through the Sommer interchange to or from all industries in the industrial area located on applicants'

12. 3,544 carloads were interchanged directly at the Sommer connection and 1,059 through the Pekin Union, the Sommer interchange having been in operation in 1957 from March to December.

lines. Under the present route, however, the handling of such traffic, requiring an interchange between applicants, involves an additional movement by the Pekin Union for distances ranging from approximately 12 to 24 miles, depending upon the location of the industry and the origin or destination of the traffic. In the interchange of overhead traffic, the distance on shipments moving (1) southbound North Western to Peoria and the Toledo westbound is approximately 12.3 miles longer over the Pekin Union than via the Sommer interchange (2) northbound North Western to Peoria and the Toledo westbound approximately 23.9 miles longer (3) northbound North Western to Peoria and the Toledo eastbound approximately 2.3 miles and (4) southbound North Western to Peoria and the Toledo eastbound approximately 9.3 miles shorter.[13] The mileage situation is the same on traffic moving in the reverse directions.

The applicants' principal contentions are that direct interchange at Sommer would expedite adequate handling of the interchange traffic at substantial savings in switching charges; that services from two line-haul carriers would accelerate development of the industrial area; that it would be uneconomical for each applicant to serve the entire area with its own tracks; that the proposal would be to the advantage of every industry in the industrial area, as each would have access to a double supply of cars in time of equipment shortage, prompt plant switching,

13. The approximate mileage between Sommer and Kickapoo Junction is 5.8 miles, Kickapoo Junction and Adams Street yard 1.9 miles, Sommer and Adams Street yard over the Toledo line 5.2 miles. Adams Street yard and Toledo's East Peoria yard over the Toledo line 5.6 miles, and between the Toledo's East Peoria yard and the Adams Street yard via the Pekin Union's East Peoria yard, 5.4 miles.

fast interchange without intermediate switching, and immediate road-haul service in all directions; and that approval of the proposal would enable applicants to handle the coal traffic for the power company at lower coal rates.

Based on studies conducted by applicants, the time consumed in the interchange of cars between applicants through the Pekin Union during the period February 15-28, 1957, on traffic delivered to the North Western (from time of delivery to Pekin Union to time of departure on the North Western), ranged from about 17 to 45 hours, or an average of approximately 19 hours, and on traffic delivered to the Toledo (from time of receipt by Pekin Union to time of delivery to Toledo) from about 2 to 53 hours, or an average of 26 hours, as compared to time consumed at the Sommer interchange for a like period in 1958 of 2.5 to 26 hours, or an average of 8 hours per car, on traffic delivered to the North Western,[14] and from about 2 to 41 hours, or an average of 12 hours per car, on traffic delivered to the Toledo.[15] Overhead traffic left at Sommer for the connecting carrier might require classification for the line-haul movement. Traffic delivered to the North Western would undoubtedly be hauled to the South Pekin yard for that purpose and Toledo cars to the East Peoria yard unless such cars are connected to through trains at Sommer, as might be the case on traffic from the south on the North Western for a westward movement on the Toledo. Applicants' studies do not seem to cover time consumed on a complete line haul to line-haul movement. This is also true of studies of the Pekin Union, as hereinafter stated.

14. Does not account for time consumed at Toledo's East Peoria yard on westbound traffic.

15. Does not account for time consumed at Toledo's East Peoria yard on eastbound traffic.

Opposition to the application on the part of the Pekin Union rests principally on the grounds that applicants' proposal would not result in expedited and economical service, as alleged, but rather in an unnecessary and wasteful duplication of an existing adequate service, that Pekin Union is willing and able to effect connections adequately and efficiently between applicants' lines at Peoria on a basis as favorable as that envisioned at the Sommer exchange, and that approval of the application would result in loss of gross revenues estimated at $43,020 a year.

Periodic checks conducted by Pekin Union employees on traffic interchanged at Sommer for the 3 periods in 1957, September 20 through October 2, October 16 through October 25, and November 11 through December 10, and for the 1 period in 1958, February 10 through February 19, indicate that cars remained at the interchange for each of the periods stated, in order, from approximately 4 to 28 hours, 3 to 87 hours, 3 to 52 hours,[16] and 3 to 33 hours. The check consisted of an inspection of the interchange from nearby points at intervals of 5 or 6 hours and the recording of car numbers and time. It does not reveal whether the cars were loaded or empty nor the point of destination. The time recorded was between checks and does not include time before or after the first and last checks. The exhibit does not reflect cars that might have arrived at and departed from the interchange between checks. Other similar checks for 2 periods of continuous checking in 1958, from 12:01 a.m., March 11, to 11:59 p.m., March 13, and from March 18-20 show that cars set out at Sommer by the Toledo for the North

16. Of a total of 256 carloads checked during the 30-day period, only 11 cars were detained more than 19 hours and the remainder from 3 to 19 hours.

Western remained at the interchange track an average for each period of 15.2 and 6.5 hours per car and on cars set out by the North Western for the Toledo an average of 6.9 and 13.1 hours per car. Most of the traffic set out was left at the interchange from 10 to 18 hours by the North Western and from 8 to 20 hours by the Toledo. These checks do not show what additional handling, if any, was furnished before the traffic started on its line-haul journey.

Other studies by the Pekin Union disclose that during the period March 22 to April 3, 1958, the time consumed by the Pekin Union to effect interchange between applicants on all carload traffic handled ranged from about 1 to approximately 23 hours, or an average of 6 hours and 52 minutes,[17] on deliveries from the Toledo to the North Western and from 7 to 16 hours, or an average of 10 hours 40 minutes, on deliveries from the North Western to the Toledo. Deliveries to the North Western by the Pekin Union were in most cases made in ample time to connect with the North Western train departing at 3:48 a.m.

The present routing on applicant's traffic originating or terminating in the industrial area on an industry located on the line other than the line-haul carrier, is via the Pekin Union, as stated. The interchange of such traffic involves a substantial additional haul. In case of the inbound movement such haul takes place after arrival at point of destination and in some cases on outbound movement before commencement of the main-line haul movement. Coal shipments to the La Marsh power plant, for example, over the Toledo line would involve,

17. Train departures after delivery to the North Western were from 3 to about 22 hours later.

after arrival at Sommer a total additional haul of some 21 miles, including the switching movement of the Pekin Union. Therefore, as to all traffic to or from industries in the industrial area requiring interchange between applicants, use of the Pekin Union for interchange in preference to the direct interchange at Sommer constitutes wasteful and inadequate transportation and is unwarranted. In connection with all such traffic applicants will be permitted to interchange at Sommer.

A somewhat similar situation exists with respect to the overhead traffic interchanged between applicants at Peoria through the medium of the Pekin Union, except as to North Western's traffic from the north for movement by the Toledo to the east, or in the reverse direction. The excepted traffic involves the equivalent of a back-haul movement when interchanged at Sommer.

The studies conducted by the parties on time consumed in effecting interchange of traffic at both interchange points is of doubtful use for comparative purposes, as the overall time consumed in the switching of the overhead traffic from time of arrival on the line-haul carrier to time of departure is not shown. However, it is of minor importance whether the Pekin Union conducts its switching in a short or a long period, if such traffic in either event is delayed several additional hours awaiting departure of the line-haul train, as disclosed in such studies. In most cases the Pekin Union delivers to the North Western in time for departure of the 3:45 a.m. train from the Adams Street yard, the only out-bound North Western train available daily at that point, and it is willing and able to meet schedules of North Western fast trains if they would stop at the Adams Street yard, which ordinarily is not the case. The Pekin Union has no control of the traffic until it is received from the connecting carrier, and

it is not primarily responsible for any delays encountered in the switching of the traffic. Such delays are due principally to time schedules of connecting carriers, which are unable or unwilling to change them because it is not to their best interests. If the North Western were to change its time schedules to provide for stops at the Adams Street yard of its fast trains, as suggested by the Pekin Union, it would not altogether eliminate delays, as the carrier would still be confronted with some delay in the switching of trains from the main line at Kickapoo Junction in and out of the Adams Street yard. The delay at the Sommer interchange would be comparatively shorter. Since the expedited handling of the traffic depends upon the arrangement of time schedules by the connecting carriers, we cannot conclude upon this record that applicants could handle or have handled the bridge traffic more expeditiously over the Sommer interchange.

North Western traffic into Peoria from the south for an eastbound or westbound movement on the Toledo, or in the reverse directions, involves a switching haul on the eastbound movement of approximately 10.8 miles if interchanged at Sommer, as compared to 13.1 miles when interchanged through the Pekin Union, and on the westbound movement no additional haul[18] is encountered through the Sommer exchange, while the interchange via the Pekin Union would involve a haul of some 24 miles. The difference in mileage between the two routes on the eastbound movement is not substantial, but the Toledo

18. Based on assumption that cars would be connected at Sommer to a westbound Toledo train, otherwise such cars probably would be hauled by an eastbound train to the Toledo's East Peoria yard for classification and movement on the next westbound train.

has its own direct line from Sommer to Peoria and no back-haul or out-of-route movement is involved. North Western traffic into Peoria from the north for an eastbound movement over the Toledo or in the reverse direction would move over an indirect or out-of-line route 16.6 miles,[19] if interchanged at Sommer, as compared to 7.3 miles over a direct route of the Pekin Union. The interchange of such traffic at Sommer requires a movement beyond Peoria to Sommer, then back to Peoria. In our opinion, use of the Pekin Union for the interchange of the overhead traffic between applicants is unwarranted because of the additional hauls involved or the direction of the movement of the traffic and the additional switching required, except in the case of North Western traffic moving into Peoria from the north for delivery to the Toledo for an eastbound movement, or in the reverse direction. The excepted traffic should continue to move through the Pekin Union. Such handling will impose no additional burden on the North Western, as it will continue to deliver and originate traffic for other carriers at its Adams Street yard.

Some gross revenue losses will be sustained by the Pekin Union but not as large as anticipated, as it will retain the predominant flow of present traffic, which moves from the north over the North Western to Peoria, thence east over the Toledo or in the reverse direction. The loss was estimated on the basis of 4,486 carloads interchanged in 1956. Calculations made by the Toledo's vice president and comptroller as to the net effect of such loss, based on the 1957 annual income account of Pekin Union, show a decrease in net income of $9,246, giving effect to decreases in transportation expenses

19. Mileage based on Kickapoo Junction.

on basis of the 1957 ratio of expenses to revenues with certain income-tax adjustments, or a decrease of $19,200 if no allowance is made for decreases in transportation expenses but only for tax adjustments, or a decrease of over 11 percent in net income.[20] The Pekin Union disagreed with such computations but made no calculation of its own.

There is a track connection between lines of the Pekin Union and the Peoria Terminal at Wolschlog,[21] where the latter maintains yard facilities. The Toledo, as heretofore stated, operates under trackage rights over the Peoria Terminal line through or near Wolschlog. A witness for the Pekin Union suggested that his railroad perform the switching to and from the power company plant over this connection, thence over a proposed extension of track to the plant, but he did not know whether existing contracts would permit interchange of traffic with the Toledo at that point. The Pekin Union also contends that the interchange of traffic at Sommer would be in violation of its agreement, dated December 1, 1911, as later supplemented, a copy of which was received in evidence, with the North Western or its predecessor providing for switching by the former of the latter's traffic in the Peoria area.[22] Construction of the agreement is now pending in the U. S. District Court for Illinois. However, the agreement is not of controlling importance in the disposition of this proceeding.

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20. 1957 net income was $174,035.

21. A point close to the end of the Pekin Union Track near Hollis.

22. The North Western and the Toledo have recently amended the tariff to exclude their tracks in the Sommer area from the Peoria switching district.

Based upon the facts and law, we arrive at the following major findings:

1. That this proceeding is within our jurisdiction.

2. That switching by the Pekin Union of traffic now interchanged between applicants at Peoria, originating or terminating in the industrial area, is inadequate, wasteful, and unnecessary transportation and results in undue delays.

3. That industrial-area traffic could be handled more expeditiously and efficiently, and without undue delay through the Sommer interchange.

4. That use of the Sommer connecting track and proposed trackage-rights operation would afford applicants an opportunity to handle the La Marsh plant's coal traffic, which they might otherwise lose to truck or water-carrier competitors.

5. That approval of the application with respect to the handling of traffic to or from the industrial area on applicants' lines would eliminate duplication of rail facilities.

6. That switching by the Pekin Union of applicants' bridge traffic, interchanged at Peoria, is also wasteful and unnecessary transportation, except as noted below.

7. That interchange between applicants at Sommer of bridge or overhead traffic arriving into Peoria on the North Western from the north for delivery to the Toledo for an eastbound movement, or in the reverse direction, requires a roundabout or indirect haul, which is unnecessary and unwarranted.

8. That the Pekin Union provides a direct route for handling the traffic referred to in No. 7 above.

9. That Pekin Union is unable to provide as efficient and economical service, except in the instance noted, as that available to applicants over the Sommer interchange.

10. That under the findings herein no substantial traffic losses would be sustained by Pekin Union.

The proposed transaction would provide adequate transportation service to the public. The exclusion of other railroads in the territory involved would be in the public interest. The transaction would not result in any increase of total fixed charges nor the guaranty or assumption of payment of dividends or fixed charges. It does not appear that the interest of carrier employees would be adversely affected. However, our authorization and approval herein will be granted upon the same conditions for the protection of railway employees as those prescribed in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672.

Subject to the conditions above referred to for protection of railway employees and the further condition that applicants continue to interchange through the medium of the Pekin Union all bridge traffic moving into Peoria from the north over the North Western for an eastbound line-haul movement over the Toledo, or in the reverse direction, we find (1) that acquisition of trackage rights by the Toledo, Peoria & Western Railroad Company and the Chicago and North Western Railway Company over the tracks of each other in the Peoria area, as described herein, is a transaction within the meaning of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions prescribed are just and reasonable, and that the transaction will be consistent wih the public interest, and (2) that the present and future public convenience and necessity require operation of the connecting

track at Sommer, described herein and except to the extent herein granted the application will be dismissed.

An appropriate certificate and order will be entered.

Arpaia, Commissioner, being necessarily absent, did not participate in the disposition of this proceeding.